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Issue Date: 18 July 2007

CASE NO.: 2005-LHC-02049
OWCP NO.: 01-153891

In the Matter of

D.T.¹

Claimant

v.

ATKINSON CONSTRUCTION COMPANY
Employer

and

TRAVELERS INSURANCE COMPANY
Carrier

APPEARANCES:

James W. Case, Esq., McTeague, Higbee, Case, Cohen, Whitney & Toker, Topsham, ME
For the Claimant

Richard F. van Antwerp, Esq., Robinson, Kriger & McCallum, Portland, ME
For the Employer

BEFORE: COLLEEN A. GERAGHTY
Administrative Law Judge

¹ In accordance with Claimant Name Policy which became effective on August 1, 2006, the Office of Administrative Law Judges uses a claimant's initials in published decisions in lieu of the claimant's full name. See Chief ALJ Memorandum dated July 3, 2006 available at http://www.oalj.dol.gov/PUBLIC/RULES_OF_PRACTICE/REFERENCES/MISCELLANEOUS/CLAIMANT_NAME_POLICY_PUBLIC_ANNOUNCEMENT.PDF.

DECISION AND ORDER ON MODIFICATION – AWARDING BENEFITS

I. Statement of the Case

The present matter involves a claim for modification of an award of compensation benefits filed by Atkinson Construction Company (“Atkinson” or “Employer”) seeking modification of compensation benefits to D.T. (“Claimant”) arising under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the “Act”). After a hand/wrist injury on August 7, 2001 and a foot injury on August 23, 2001, the Claimant was awarded permanent partial disability compensation payments for a period of 31.2 weeks for his hand/wrist injury and, temporary total disability compensation benefits for the period of August 23, 2001 to October 6, 2002 and from November 6, 2002 to the present, for his foot injury pursuant to a Decision and Order issued by the undersigned on March 2, 2004. The Claimant continues to receive benefits under my prior order.

On June 17, 2005, the Employer filed a request for modification of the order. The matter was referred to the undersigned Administrative Law Judge (“ALJ”) and a formal hearing was held on June 6, 2006, in Portland, Maine. The Claimant appeared at the hearing represented by counsel and an appearance was made by counsel on behalf of the Employer. The hearing afforded all parties an opportunity to present evidence and oral argument. The Hearing Transcript is referred to herein as “TR.” Testimony was heard from the Claimant and vocational expert Christopher Temple. The official documents were admitted as Administrative Law Judge Exhibits (“ALJX”) 1-20. TR 10-15. Documentary evidence was admitted without objection as Claimant’s Exhibits (“CX”) 1-20 and Employer’s Exhibits (“EX”) 1-7. TR 7-8, 56. The record was held open for three weeks to permit the Employer to submit the deposition of Dr. Singh and the progress notes of R.B. Rau. TR 8-9. The exhibits were submitted, marked as EX 5 and 6 respectively, and admitted. Following the hearing the parties filed post-hearing briefs and the record is now closed.

II. Parties’ Stipulations and Issues Presented

The parties offered the following stipulations at the hearing: (1) the date of injury is August 23, 2001; (2) the injury being referenced is the injury to the Claimant’s left foot; (3) the average weekly wage is \$943.19; (4) the Employer and the Insurance Carrier are currently paying compensation for temporary total disability with respect to the left foot injury; (5) the parties were engaged in an employer/employee relationship at the time of the injury; (6) the Claimant gave timely notice of his injury and filed a timely claim; and (7) the Employee’s Notice of Controversion is timely. TR 5-6.

The issues in dispute are: (1) the nature and extent of the Claimant’s present disability; (2) the timeliness of a claim for benefits for a back condition; and (3) the whether the Claimant’s psychiatric condition was aggravated by his work-related left foot injury.

III. Findings of Fact and Conclusions of Law

A. Background

The Claimant is forty-seven years old and left high school after completing the tenth grade. CX 3 at 1; CX 20 at 24. He is currently married and has a son. TR 34. The Claimant was employed at a junkyard for one year after he left high school. CX 20 at 26. He then worked for a family-owned construction company for one year before becoming a machinist at Diamond Machine where he was employed for nine years. CX 20 at 26. At the time of his employment with Atkinson he had been a member of the Carpenter's Union for twelve to fifteen years. CX 20 at 25. He began working for Atkinson as a welder in 1999 and he remained with Atkinson on various projects until his toe injury on August 23, 2001. CX 20 at 27, 57-58. He returned for a brief project as a supervisor from October 7, 2002 to November 5, 2002. *Id.*

The Claimant testified that he experienced a painful sensation in his groin on December 22, 1999 while he was maneuvering a large piece of timber with a co-worker. CX 20 at 28. The Claimant saw his family physician, Dr. Kirk Oswald, who recognized a hernia and referred him to a surgeon. CX 20 at 28-29. Surgery was performed on January 27, 2000 and he spent a month recovering. CX 20 at 29. He saw Dr. Oswald again on March 24, 2000 after experiencing pain from lifting a 200 pound tank. CX 8 at 52. Dr. Oswald placed a restriction on lifting over twenty pounds repetitively. *Id.*

The Claimant was moved to a shore position and one of his tasks was to drill holes inside a concrete pipe. CX 20 at 31-32. The Claimant testified that the drill would often "catch" and cause his hand to slam against the concrete wall. *Id.* He testified that on the third day, August 7, 2001 he hit his hand "real good" and his co-worker advised him to see a doctor. *Id.* The Claimant was taken to Mid-Coast Hospital where x-rays were taken and his hand was put into a splint. CX 1 at 1-5. The Claimant was instructed to leave the splint on for five days and he was permitted to return to work. CX 20 at 33-34.

The Claimant suffered his third injury, to the left foot, on August 23, 2001. CX 1 at 12. The Claimant was in the process of unloading a 400 pound sewer cap from the back of a pickup truck when his partner lost his grip and the sewer cap fell onto the Claimant's big toe. TR 21-22. The impact split his toe lengthwise and he received twenty-seven stitches in the emergency department at Mid-Coast Hospital. CX 20 at 36-37. The Claimant underwent several surgeries as a result of this injury. CX 1 at 12; CX. 6; CX 7. The Claimant testified that, at present, his left foot condition is the same or worse than it was when he testified at the initial hearing in 2003. TR 23. As a result of pain in his foot he walks mainly on his heel and the side of his left foot. *Id.* The Claimant stated that he has pain after being on his feet for awhile and when coming down stairs. *Id.* He said that he no longer has a vegetable garden and he must pay friends to cut his bushes. TR 25-26, 30-31.

The Claimant states that he has also developed problems in his lower back. TR 30, 37. He received several manipulative treatments from Dr. Kary, an osteopath, on referral from Dr. Oswald. TR 48. He testified that he has not seen Dr. Kary since December 2004 because Dr. Oswald has not authorized additional referrals. TR 48.

In 1996, the Claimant began seeking treatment for depression with R.B. Rau as a result of relationship problems with a live-in girlfriend.² TR 32-33; EX 6 at 1. He continued treatments for two years. *Id.* At this time the Claimant was being prescribed Zoloft by Dr. Oswald, his family physician. TR 33. He testified that he did not miss any work and that he was actually working overtime.³ *Id.* He further testified that the psychological problems he is experiencing now are much more severe than his problems in 1996. *Id.* He stated that he now feels like a “useless person, a useless man,” but “knew back then that it was just a problem with a woman.” *Id.*

The Claimant continues to suffer from symptoms of depression and he stated at the hearing that he does not like his life anymore. TR 24. He testified that his symptoms are now “ten, twenty times worse.” TR 35. He is currently taking three medications, all of which are for his psychiatric problems. TR 47. He stated that he is worried about security in his life, being able to take care of his son, and financial security for the future. TR 35. The Claimant testified that he had been experiencing marital conflict which added to his depression and anxiety because his wife did not understand depression. TR 46-47. He further testified that he is unhappy with his life because he spends all his time in the house doing little things, “stuff that the wife should be doing.” TR 35-36. He is unable to work or do physical activities in his yard for significant periods of time due to his physical injuries. TR 35-38. He testified that he cannot use hand tools because of his wrist injury and that the layout of his yard requires him to lean on one leg to use his weedwacker. TR 36. He explained that the leaning causes back pain and standing or walking for more than three hours causes “excruciating” pain that goes up his leg and sometimes causes swelling in the leg and toes. TR 36-37.

The Claimant stated that his psychological condition impairs his ability to work and leave the house. TR 26-27. He testified that he has considered working in a position other than construction, but stated that he is not reliable. TR 39. He does not get up at the same time every day due to difficulty sleeping and when he does wake up he has shaking spells before his medicine takes effect. TR at 39-41. He further testified that he would be unable to work in an environment with lots of people because being in crowds of people sometimes induces anxiety attacks. *Id.* He explained that he sometimes experiences these attacks in WalMart or the grocery store and he has to leave the store in a hurry and leave baskets full of groceries. TR 26.

The Claimant testified that he believes investigators have been following him extensively since before the initial hearing. TR 49. He stated that they follow him for two to three days

² R.B. Rau, a Licensed Clinical Social Worker, treated the Claimant for relationship issues and depression in the mid 1990s. TR 10; EX 6 at 1.

³ R.B. Rau’s progress notes from October 24, 1996 include “missed days work, can’t concentrate, furious, hurting.” EX 6 at 1.

around the time he receives his payment checks and estimated that he sees them four times a month. TR 41-42. He further testified that he has approached some of the investigators and they have admitted that they have been hired to investigate him. TR 41, 43. The Claimant stated that being followed makes him anxious and angry. TR 43.

B. Medical Evidence

1. *Dr. Christopher Sacco*

On July 1, 2002, the Claimant consulted a podiatrist, Dr. Sacco, as he had ongoing foot pain. CX 7 at 47.⁴ Dr. Sacco noted a “possible onychomycosis, possible onychodystrophy from the trauma and possible bony pathology from the crush injury” and took x-rays. *Id.* On July 10, 2002, the Claimant returned to discuss the results of the x-rays and the possibility of a permanent toe nail removal to alleviate the symptoms. *Id.* The Claimant returned for the procedure on July 21, 2002, and was given a note for light work duty for two weeks. *Id.* The Claimant returned for removal of a re-growth of a portion of the toe nail on October 23, 2003. CX 7 at 50. In follow-up notes from November 11, 2003 Dr. Sacco noted that the Claimant was performing proper wound care and the area was not particularly sore. *Id.*

2. *Dr. Kirk Oswald*

Dr. Oswald is the Claimant’s primary care physician. The Claimant saw Dr. Oswald on October 26, 2000, for “continued feelings of malaise.” CX 8 at 53. Dr. Oswald diagnosed the Claimant with “[an] anxiety disorder and psychosocial dysfunction with question of depression” and continued him on Celexa. CX 8 at 54. On October 5, 2001, seven weeks after the Claimant’s toe injury, he sought treatment from Dr. Oswald for increased anxiety and depression. CX 8 at 55. The Claimant told Dr. Oswald that ongoing expenses and a lack of Worker’s Compensation benefits increased his anxiety and that he would get “so agitated that his jaw starts quivering with anxiety.” *Id.* Dr. Oswald modified the Claimant’s medication to treat the anxiety and depression. *Id.*

The Claimant first reported back pain to Dr. Oswald on June 16, 2003. CX 8 at 57. The Claimant told Dr. Oswald that the pain had been occurring for almost a year since his foot injury and gradually worsened over the past month. *Id.* He indicated that the pain makes it difficult to get up in the morning and lasts throughout the day, although by noon he is able to walk “somewhat upright.” *Id.* The Claimant reported that he had been building a rock wall over the last month which had been aggravating the symptoms. *Id.* The Claimant returned for a checkup and a review of x-rays on June 30, 2003. CX 8 at 59. At this point the Claimant was wearing an abdominal belt which helped alleviate his back pain. *Id.* Dr. Oswald referred the Claimant to Dr. Daniel Kary for consideration of manual therapy. *Id.*

The Claimant was next seen by Dr. Oswald for depression and anxiety on June 1, 2004. CX 8 at 60. Dr. Oswald noted that the Claimant complained of “increasing agitation with anxiety and depression” and “was quite tearful and desperate in his plea for something to make

⁴ The Claimant consulted Dr. Sacco for continued left foot pain following the initial treatment of the left toe crush injury. See CX 3.

him feel better.” *Id.* Dr. Oswald cites marital conflict between the Claimant and his wife as a source of the Claimant’s agitation. *Id.* The Claimant told Dr. Oswald that his wife was upset that he required antidepressant medication but that his symptoms get a lot worse when he tries to stop taking them. *Id.* Dr. Oswald listed his diagnosis as “anxiety disorder, severe, with underlying depression” and encouraged the Claimant to contact his insurance provider and get a referral for a psychiatric evaluation and ongoing care. *Id.*

3. *Dr. Daniel Kary*

The Claimant met with Dr. Kary, an osteopath, on July 3, 2003 on the recommendation of Dr. Oswald. CX 11 at 72; TR 48. Dr. Kary noted that the Claimant had difficulty carrying his weight on his left foot and had to lean to the right while sitting. *Id.* He diagnosed somatic dysfunction and low back pain with the left being greater than the right. CX 11 at 73. The Claimant testified that during their sessions Dr. Kary cracks his back to realign his spine. TR 37.

The Claimant returned for follow-up on July 10, 2003, at which time Dr. Kary recommended that the Claimant avoid activities that require stooping and bending and concentrate on activities such as walking to keep his legs active. CX 11 at 74. The Claimant next saw Dr. Kary on June 7, 2004. CX 11 at 75. Dr. Kary noted that “he did well after I saw him last on 7-10-03 with symptoms easing within a few weeks and staying at a better level.” *Id.* The Claimant returned because the pain worsened after he helped a friend work on a vehicle. *Id.* Dr. Kary performed a manipulative procedure again and noted much better flexibility afterward. *Id.* The Claimant’s symptoms lessened until he stumbled on the steps outside his home in the Fall of 2004 and sought treatment. CX 11 at 76. Dr. Kary performed manipulative treatment on December 20, 2004. *Id.*

4. *Dr. David Biesinger*

The Claimant was referred to Dr. Biesinger, a podiatrist and foot surgeon, by Dr. Oswald and was examined on January 4, 2005. CX 13 at 100. The Claimant presented with symptoms of cold sensitivity and numbness of the toes and along the inside of the left foot and ankle. *Id.* Dr. Biesinger provided an assessment of “probably CRPS left foot /sp injury.” CX 13 at 101. He informed the Claimant that not much can be done as everything with the foot appears normal except for the numbness and nerve pain. *Id.* He suggested a prescription of Neurontin. *Id.* On February 22, 2005, the Claimant met with Dr. Biesinger and reported that the Neurontin was very effective both with his foot and back pain. CX 13 at 102. On the Claimant’s July 18, 2005 visit, Dr. Biesinger noted a pitting edema and ankle swelling. CX 13 at 104. This was the Claimant’s last visit with Dr. Biesinger because Dr. Biesinger moved to Massachusetts. TR 52. The Claimant was referred to Dr. Saraydarian, who works out of the same office. TR 52-53. He prescribed a compression stocking for the Claimant which keeps down the swelling in his foot. TR 54.

5. *Dr. David Phillips*

The Claimant initially saw Dr. Phillips of Physical Medicine & Rehabilitation Ltd. for an independent medical examination on June 22, 2002, at the recommendation of counsel. After an

examination and review of medical records he recommended work restrictions and assessed the level of permanent impairment for each of the Claimant's injuries. CX 16 at 111-112. Dr. Phillips assigned lifting restrictions for the hernia injury and assessed a 5% whole person impairment. CX 16 at 112. Dr. Phillips also assigned restrictions for the left foot injury and assessed a 5% lower extremity permanent impairment. *Id.* Dr. Phillips assigned work restrictions for the wrist/hand injury and assessed a 10% upper extremity permanent impairment. *Id.* Dr. Phillips noted that the Claimant was experiencing chronic pain as a result of each of his injuries. CX 16 at 111. He recommended that the Claimant see a podiatrist for problems he was having with his toe nail on the injured toe. *Id.*

The Claimant returned to Dr. Phillips on October 4, 2003, for a reevaluation of his chronic left foot pain. CX 16 at 113. He indicated that his pain reaches a 10 on a scale of 1-10 in the winter and a 3-5 in the summer. *Id.* Dr. Phillips noted that the Claimant had developed lower back pain due to his altered gait. CX 16 at 114, 120. At that time, Dr. Phillips assessed a 10% foot impairment as a result of the work injury. CX 16 at 115.

In a third independent medical examination on October 26, 2005, which was followed by a report dated October 31, 2005, Dr. Phillips stated that the Claimant had developed Chronic Regional Pain Syndrome (CRPS) in his left foot and ankle since their last examination. CX 16 at 120. He attributed this development to the Claimant's chronic left foot pain which arose from the fracture of the great left toe. *Id.* He indicated that the Claimant was beginning to develop mirror-image-type pain in the right foot and was wearing supportive stockings on both lower legs to treat the CRPS. *Id.* Dr. Phillips' assessment at that time was chronic pain in the left foot and ankle with the development sequelae of CRPS and mirror-image-type pain in the left foot, chronic right wrist pain, chronic low back pain secondary to altered gait secondary to chronic left foot pain, onset of Bipolar Type II Disorder, depressed mood with panic disorder and agoraphobia sequelae of chronic pain, decreased level of functioning due to his work-related injuries, and status post right inguinal herniorrhaphy with stabilization. CX 16 at 123. Dr. Phillips stated that the Claimant has "essentially no work capacity due to his physical and psychiatric symptoms." *Id.* He indicated that the Claimant could take on a very limited volunteer position but "he in no way could hold down a full-time or part-time job." *Id.* He further stated that the CRPS is what makes it very difficult for the Claimant to work and it significantly contributed to the onset of his bipolar and panic disorders. *Id.*

6. *Dr. Christiane Gardner*

The Claimant saw Dr. Gardner, a podiatrist, for an independent medical examination with regard to his toe injury on March 29, 2005. EX 1. Dr. Gardner examined the Claimant and took three x-rays. EX 1 at 1-2. She noted that the clinical and radiographic findings did not match the Claimant's complaints. EX 1 at 2. Her report states that he was experiencing "pain extending from the midfoot proximally along the anterior aspect of the left leg" and "numbness along the dorsal aspect of the left hallux, yet [was] sensitive to sharp/dull sensations." *Id.* Dr. Gardner noted that there is a possibility that the Claimant's back issues may be a contributing factor to the numbness and pain in his left foot. *Id.* Dr. Gardner concluded that the Claimant had regained the ability to work in regards to the left foot and suggested restrictions of limited kneeling and any activity requiring him to stand on his toes. *Id.* Dr. Gardner stated that he has

reached maximum medical improvement and gave impairments of 3% foot, 1% whole body, and 2% lower extremity. *Id.*

7. *Dr. Seth Kolkin*

Dr. Kolkin, who is board certified in neurology, performed an independent medical examination of the Claimant and prepared a report dated March 28 2006. EX 2. In regards to CRPS, Dr. Kolkin explains that the condition is “a theoretical construct to explain ongoing pain and physical signs after a noxious injury.” EX 2 at 8. He stated that the Claimant lacks the appropriate symptoms and time course and does not fulfill the criteria for diagnosing CRPS as set forth by the International Association for the Study of Pain. *Id.* The criteria require the presence of allodynia or hyperalgesia, evidence of edema, changes in the skin, blood flow, or abnormal pseudomotor activity. *Id.* After reviewing the reports of the Claimant’s treating physicians, Dr. Kolkin determined that none of them had observed the changes that make up the criteria for a diagnosis. *Id.* He agreed that the Claimant has a 1% whole body permanent impairment as a result of the toe injury but did not find an additional impairment for the subjective pain. *Id.*

Dr. Kolkin reviewed the psychiatric records and concluded that the subjective pain is not the primary problem causing his psychiatric symptoms. *Id.* He noted the pre-existing bipolar disease and concluded that marital conflict seems to be the primary exacerbating stressor. *Id.* Dr. Kolkin could not find an underlying physiological reason for severe chronic pain and thus could not attribute psychiatric problems to subjective symptoms without an underlying cause. *Id.* He stated that a lot of the Claimant’s foot and back pain appears to be “perpetuated by his dysfunctional gait.” EX 2 at 9. In regards to work capacity, Dr. Kolkin acknowledged that there would be limitations due to the range of motion in the left great toe, and stated that the Claimant should avoid squatting and standing on his toes and kneeling. EX 2 at 8-9. Dr. Kolkin said that accommodations for the work restrictions could be made and physical therapy along with an improved gait would reduce the pain and improve function. *Id.*

8. *Dr. Abhay Singh*

On August 2, 2004, the Claimant began treating with Dr. Singh, a psychiatrist, by referral from Dr. Oswald. CX 12 at 77. Dr. Singh recorded the history of the present illness as “recurrent depression for the last ten years” with numerous episodes of depression, the current having been occurring for the past year and a half. CX 12 at 77. The Claimant reported experiencing “highs” characterized by an “unusually elevated mood, feeling powerful and very energetic.” *Id.* The Claimant also reported anxiety attacks characterized by “shaking, increased heart rate, feeling dizzy and sweating, and generalized shakes.” *Id.* He reported that these attacks had been present since 2002 with a recent increase to three times per day. *Id.* The Claimant told Dr. Singh that he received Vicodin and Percoset from his friends occasionally and denied any withdrawal symptoms. CX 12 at 78. Dr. Singh advised him that this abuse could be contributing to the depression and anxiety attacks. CX 12 at 79. His diagnosis at this time was bipolar affect disorder, type II currently depressed, panic disorder without agoraphobia, and

alcohol dependence in persistent remission.⁵ *Id.* This is the first time the Claimant was diagnosed with Bipolar Disorder, although Dr. Singh noted a “ten year history of recurrent depression interspersed with brief hypomanic episodes.”⁶ CX 12 at 78. Dr. Singh strongly encouraged the Claimant to get into individual psychotherapy because it had been helpful in the past, or couples therapy if possible. CX 12 at 79.

The Claimant continued to treat with Dr. Singh and reported a “remarkable improvement in his mood” on September 17, 2004. CX 12 at 85. At this time he was engaging in activities such as gardening and mowing his lawn which are very important to him.⁷ *Id.* The Claimant indicated on August 30, 2004 that he had found a psychotherapist and would soon begin treatment. CX 12 at 83. At the September 17 appointment Dr. Singh encouraged him to continue the individual psychotherapy for his marital conflict. CX 12 at 85. On November 15, 2004 the Claimant reported that his panic symptoms had returned. CX 12 at 87. He indicated that his stressors were legal issues and his wife’s trip to Columbia, and he had not been pursuing individual counseling for the last several weeks because his counselor was unavailable. *Id.* On December 17, 2004 Dr. Singh suggested cognitive behavioral therapy as a means of treating the persistent panic symptoms. CX 12 at 90. Dr. Singh’s notes indicate that the Claimant showed interest in the treatment and was also seeking to re-initiate individual counseling. *Id.* Dr. Singh noted that the Claimant was “feeling upbeat” on February 2, 2005, after returning from vacation and experiencing less marital conflict. CX 12 at 93. However he was not in group or individual therapy at this time. *Id.* On October 17, 2005 the Claimant reported that he was again depressed. CX 12 at 99-A. The stressors he identified were his mother-in-law’s declining health, his lower extremity pain, and some conflict with his former employers over disability payments. *Id.* Dr. Singh’s assessment was “an exacerbation of depressive symptoms in context of his current psychosocial stressors.” *Id.*

The final notes in the record are dated March 27, 2006. CX 12 at 99-E. At this time the Claimant had told Dr. Singh that the Employer’s insurance company had investigators following him, which was “very distressing.” *Id.* At this time his diagnosis was bipolar disorder type II and panic disorder with agoraphobia. *Id.* Dr. Singh testified that although there were periods when the Claimant was stable and his symptoms appeared to recede, the condition is chronic and he was never completely free of his symptoms for a significant period of time. EX 5 at 23. Dr.

⁵ During his deposition, Dr. Singh explained that “Bipolar Affective Disorder is a mood disorder characterized by hypomanic episodes and recurrent depressive episodes.” EX 5 at 8. Hypomanic episodes are characterized by “an elevated or irritable mood, increased goal directed activity, increased self-esteem and increased energy, and a decreased need for sleep.” EX 5 at 9. These periods are mixed with longer periods of depression. *Id.* Dr. Singh explained that the difference between Type I and Type II disorders is that Type II is characterized by the hypomanic episodes whereas Type I is marked by manic episodes which are longer in duration and more severe. EX 5 at 9-10.

⁶ The Claimant stated during an examination with Dr. Bourne that the first period of hypomania occurred one year after his toe injury and disagreed with Dr. Singh’s report that he had been experiencing hypomania for ten years. EX 3 at 15. He explained that Dr. Singh may not have understood him due to linguistic problems. EX 3 at 16.

⁷ During the hearing the Claimant testified that he hires his friends to do his gardening work and they use his equipment which he then cleans and maintains. TR at 31. He further testified that “that’s the only part that makes me feel, you know, like somebody.” *Id.* “But it’s not the same. It’s not the same as wishing you’d be able to work.” *Id.*

Singh commented on the relationship between the psychiatric condition and the physical injuries in a response to a question about Dr. Bourne's report. EX 5 at 28. Dr. Singh does believe that the chronic pain contributed to the mood disturbances and he testified that "bipolar disorder is not caused by an injury, but any mood disorder can be affected by ongoing medical or psychological stressors and chronic pain is a known stressor." EX 5 at 28-29. Dr. Singh is not optimistic that the Claimant could return to work in the near future because "he has a combination of bipolar disorder and panic disorder and this is a serious psychiatric condition, a combination of conditions that has affected his functioning for a significant period of time." EX 5 at 33. He further stated that returning to work would require an "absence of psychiatric symptoms for a reasonable period of time, absence of pain symptoms for a reasonable period of time." *Id.*

9. *Dr. John Newcomb*

The Claimant saw Dr. Newcomb, a psychiatrist, on November 5, 2005, for an independent medical examination. CX 17 at 126. Dr. Newcomb was also able to review the Claimant's medical records. CX 17 at 127-A. He noted a depressed mood and an affect that indicates crying spells. CX 17 at 127. The Claimant stated that his anxiety is worse when he has a lot of pain and Dr. Newcomb noted that there "appears to be a preoccupation with pain, in terms of thought content." *Id.* Dr. Newcomb made a diagnosis of bipolar disorder currently depressed, panic disorder, chronic pain and limitation of function due to multiple injuries, high stress, and a GAF score of 40.⁸ *Id.* In regards to a relationship between the Claimant's injuries and his psychiatric symptoms, Dr. Newcomb stated that "his injuries with their chronic pain and limitation of function make a significant contribution to the severity of his depression and also to the severity of his panic disorder. CX 17 at 127-A. Dr. Newcomb further stated that the Claimant would not be able to function in a workplace in a productive manner. *Id.* He cited the Claimant's poor concentration, depressed mood, impaired sleep, and mental fatigue as factors in reaching that conclusion. *Id.*

10. *Dr. David Bourne*

The Claimant underwent a comprehensive psychiatric evaluation with Dr. David Bourne, a psychiatrist, on April 12, 2006. EX 3. The Claimant told Dr. Bourne that "he has no goals and has no feeling of accomplishment because he is not working." EX 3 at 10. He reported that he has crying spells up to three times a day and has poor concentration. *Id.* He also stated that his agoraphobia has not been as severe and he is now able to leave the house. EX 3 at 11. He admitted that he has suicidal thoughts but denied having a plan and stated that his son is his deterrent. *Id.* The Claimant stated that he often cannot eat at dinnertime because his wife is so angry and he stated that he had not been intimate with her in two years. *Id.* He indicated that his

⁸ The Global Assessment of Functioning (GAF) Scale is used to rate an individual's overall psychological, social, and occupational functioning. The GAF scale ranges from 0 to 100 and is divided into 10 ranges of functioning, requiring the examiner to pick a value that best reflects the individual's overall level of functioning using either symptom severity or functioning. ...[A] GAF score in the range 31-40 indicates "some impairment in reality testing or communication (e.g., speech is at times illogical, obscure, or irrelevant) OR major impairment in several areas such as work, school, family relations, judgment, thinking or mood." *Lozado V. Barnhart*, 331 F.Supp.2d 325, 330 (E.D. Pa. 2004), citing *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR)* 32-34 (4th ed. 2000).

wife blames his problems on his medications because she does not understand depression, although she was beginning to learn about bipolar disorder from a co-worker. EX 3 at 12. The Claimant described experiencing hypomanic episodes where his thoughts move very quickly, causing migraines, and he is unable to control his thoughts. *Id.* At these times he is very irritable and believes he could be dangerous. *Id.* He experiences increased energy and he spends money impulsively. EX 3 at 13. The Claimant gave Dr. Bourne a detailed account of the investigators that he believes are employed by the Employer's insurance carrier and are watching him. EX 3 at 17-18.

Dr. Bourne provided a diagnosis of bipolar type II disorder, most recent episode depressed, panic disorder with agoraphobia, alcohol dependence in sustained full remission, and a GAF score of 35. EX 3 at 23. He listed the stressors of extreme marital conflict, financial difficulties, contested worker's compensation issues, and chronic pain. *Id.* Dr. Bourne noted that "[Claimant's] paranoia supports psychotic thought processes." EX 3 at 24. Dr. Bourne believes that the Claimant's psychiatric problems "significantly preceded his occupational injuries" and "would likely persist with the same symptoms even if the injuries had not occurred." *Id.* Dr. Bourne also stated that the psychiatric condition is not a malingered condition. EX 3 at 25. He noted that there are "distinct paranoid features" to the Claimant's illness evidenced by his accounts of investigators following him on five hundred occasions. EX 3 at 26. Dr. Bourne concluded that the psychiatric conditions were not related to his physical injuries. *Id.* He noted that the hypomania and depression preexisted his injuries, and although his panic disorder may have developed after the injuries, it is unlikely that the effects of the injuries caused the disorder. *Id.* He attributed the worsening of the psychiatric conditions, including the bipolar type II disorder, "to the progression of the illness itself. *Id.*

C. Vocational Evidence

1. *Mr. Christopher Temple*

Christopher Temple is a vocational rehabilitation counselor who testified in support of the Employer. TR 57. Mr. Temple has a Master of Education degree from the University of Maine and has been a Certified Rehabilitation Counselor since 1989. EX 7. He testified that he is currently employed with Temple Rehabilitation Associates in Gardner, Maine where he offers individualized rehabilitation services and performs labor market research. TR 57. Mr. Temple prepared a transferable skills analysis which determines what skills an individual has from past employment, education, and experience that can be applied to future employment. TR 61. In preparation for preparing the transferable skills analysis Mr. Temple reviewed all of the Claimant's medical records except Dr. Bourne's report and gathered information on the Claimant's work history by reading the transcript of the hearing in September 2003. EX 4 at 1. He did not meet with the Claimant or obtain any information from him directly. TR 76.

Mr. Temple testified that he came to the conclusion that the Claimant would be best suited for a machinist position due to his work experience. TR 62. He admitted that not every available machinist position would be appropriate, but testified that there is a probability for many suitable positions. *Id.* Mr. Temple made contacts with eight employers that were hiring for positions he believed would be appropriate for the Claimant. TR 62-63; EX 4 at 6-9. He

testified that he has placed clients in machinist positions and generally has a good understanding of what the position entails. TR 64. He stated that all of the positions listed in Section 1 of the report are primarily standing positions, although he looked for positions that did not require a lot of walking or walking on uneven ground. TR 65-68, 87. TR 69-70. Also included are unemployment statistics for the State of Maine which indicate that the Lewiston market is comparatively good and stable. TR 75-76.

On cross-examination, Mr. Temple testified that the Employer's counsel instructed him to use the work capacity assessment of Dr. Kolkin and to consider the capacity assessments of other physicians in regards to the right wrist injury. TR 77. He did not rely on the work capacity assessment of Dr. Newcomb, which would render all of the positions in the report inappropriate. TR 77-78. He testified that he was aware of Dr. Newcomb's assessment that the Claimant could not work, but concluded that the Claimant could work with restrictions of no kneeling, squatting, or standing on toes, minimal heavy lifting, and general hand/wrist precautions against repetitive motions and impact. TR 79-80; EX 4 at 5. The report does not reference any consideration given to the Claimant's psychiatric conditions; however, Mr. Temple testified that he looked for positions with a low stress level and a lower number of people in the workforce. TR 81. He conceded that there were no references to low-stress jobs in the medical reports and that that was his personal opinion. *Id.* Mr. Temple also testified that although he included welding in the Claimant's employment history, he did not have specific details on the Claimant's training and the types of welding he performed. TR 84-85.

D. Section 22(a) Modification

Modification of a prior award under Section 22 of the Act may be requested by any party-in-interest within one year of the last payment of compensation or within one year of the rejection of a claim if there has been a mistake of fact or a change in condition. *Wynn v. Clevenger Corp.*, 21 BRBS 290, 292 (1988).⁹ "Modification of an award based on a change in a claimant's condition may be granted where the claimant's physical or economic condition has improved or deteriorated following the entry of an award of compensation." *Id.* The Section 20(a) presumption is inapplicable to the issue of whether a claimant's condition has changed since the prior award. *Leach v. Thompson's Dairy, Inc.*, 6 BRBS 184, 188 (1977). When a party seeks a modification an initial determination must be made as to whether the petitioning party has met the threshold requirement by offering evidence demonstrating that there has been a change in the claimant's condition. *Jensen v. Weeks Marine, Inc. (Jensen II)*, 34 BRBS 147, 149 (2000); *Duran v. Interport Maint. Corp.*, 27 BRBS 8, 14 (1993); *Vasquez v. Cont'l Mar. of San Francisco, Inc.*, 23 BRBS 428 (1990). This initial inquiry does not involve a weighing of the relevant evidence of record; it is limited to a consideration of whether the newly submitted evidence is sufficient to bring the claim within the scope of Section 22. *Id.* If so, the ALJ must determine whether modification is warranted by considering all of the evidence on record to discern whether there was, in fact, a change in the claimant's physical or economic condition.

⁹ Section 22 of the Act states in pertinent part, "Upon his own initiative, or upon the application of any party in interest . . . the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation . . . review a compensation case . . . in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation." 33 U.S.C. § 922.

Id. “Such evidence, however, must demonstrate that there was, in fact, a change in the claimant's economic condition from the time of the award to the time modification is sought.” *Lombardi v. Universal Mar. Serv. Corp.*, 32 BRBS 83, 87 (1998).

1. *Change in Physical Condition*

a.) *Left Foot Injury*

The Employer contends that there has been a change in the Claimant's physical condition. Resp. Br. at 7-9. Specifically, the Employer asserts that the Claimant's left foot injury has reached a point of maximum medical improvement and the impairment is now permanent. *Id.* The Employer sets forth the opinions of Dr. Gardner and Dr. Kolkin to support its assertion that the Claimant reached maximum medical improvement on March 29, 2005, the date of Dr. Gardner's examination. *Id.* The Claimant agrees that his left foot injury is now permanent and that permanency was reached on March 29, 2005 based upon Dr. Gardner's opinion. Cl. Br. 5. I find that the Claimant's left foot impairment is now permanent.¹⁰ The Employer has met the threshold requirement for modification by offering evidence which demonstrates that there has been a change in the Claimant's condition as his left foot impairment is permanent.

In order to prevail on a motion for modification seeking to reduce, limit or terminate the benefits being paid, the Employer must show that there has been an improvement in the Claimant's physical or economic condition. The Employer asserts he has shown a change in the Claimant's physical condition. Resp. Br. at 8. However, the Employer has not alleged that there has been an improvement in the Claimant's physical condition. Rather, the Employer argues only there has been a change because the impairment is now permanent.

The Claimant asserts that his medical condition is the same or worse since my initial decision awarding benefits. Cl. Br. at 5-6. The Claimant states that he continues to experience daily pain in his left foot and that he is able to walk only one hour before he must rest to relieve pain. He tries to stay off his foot as much as possible.

Relying on Drs. Biesinger and Saraydarian, the Claimant contends that his left foot condition has progressed to a Complex Regional Pain Syndrome (CRPS). *Id.* at 6. Dr. Phillips also diagnosed chronic pain in the left foot and ankle due to crush injury. CX 16 at 123. Dr. Kolkin describes the specific criteria necessary for a diagnosis of CRPS and asserts that none of the Claimant's physicians have noted the presence of any of the required criteria for this diagnosis. EX 2 at 8-9. Dr. Kolkin stated that the Claimant did not have CRPS. After careful

¹⁰ The Employer appears to argue that because the impairment is now permanent, and the injury is to a body part listed in Section 8(c) of the Act, that is the end of the inquiry on his petition for modification, and the Claimant is limited to recovery under Section 8(c)(4). Resp. Br. at 7-9. The Employer's analysis is incorrect. The initial award was for temporary total disability compensation benefits. Having determined that the impairment is now permanent does not eliminate the need to consider the extent of the impairment, e.g., whether total or partial.

In addition, although the Employer argues that there has been a change in the Claimant's condition because his foot impairment is now permanent, the Employer does not clearly argue that there has been an improvement in the Claimant's foot condition.

consideration of the medical opinions regarding CRPS, I credit Dr. Kolkin's opinion that the Claimant does not have CRPS. Dr. Kolkin discussed the specific diagnostic criteria necessary for CRPS and the Claimant does not display the symptoms or characteristics to make such a diagnosis. In the absence of a well-reasoned analysis from the Claimant's physicians supporting their diagnosis of CRPS, and in light of Dr. Kolkin's contrary analysis, I find that the objective medical evidence does not support a finding of CRPS.

Although the Claimant does not have CRPS, he continues to suffer from chronic left foot pain. Dr. Kolkin believes the pain to be entirely subjective, but he also states that the Claimant's left foot and back pain may be perpetuated by the Claimant's dysfunctional gait. The Claimant's antalgic gait is the result, in large measure, of walking on his heel and the side of his left foot following his left foot crush injury. Dr. Gardner stated that the clinical and radiographic findings did not match the Claimant's complaints regarding his left toe. She indicated that his left foot pain may be attributed to the manner in which he now holds his foot, in an inverted position, and she also questioned whether his low back pain issues might be contributing to his foot pain. The Claimant's treating physicians, Drs. Biesinger and Saraydarian, have stated that the Claimant has chronic pain and have prescribed Neurontin to treat his pain. I accept the Claimant's statements of left foot pain, as his physicians are treating him for pain, and both of the Employer's experts have noted that the Claimant holds his foot in an unnatural position, affecting his gait and that this may be contributing to his pain complaints, suggesting an objective basis for his foot pain.

In addition, when I issued the Decision and Order Awarding Benefits, the Claimant had work restrictions which permitted climbing ladders occasionally and minimal squatting, stooping or kneeling and precluded working in temperatures below 32 degrees. CX 19 at 152. In the present proceeding, the Employer's experts, Drs. Gardner and Kolkin, preclude or limit squatting, kneeling and standing on his toes. Thus, the Claimant has essentially the same work restrictions now as he did when I issued the initial decision awarding compensation benefits. Accordingly, I find that the Claimant's left foot condition is essentially unchanged from the time of my initial decision and order.¹¹

b.) Back Injury

The Employer also contends that any claim that the foot injury has resulted in an altered gait producing low back pain which now contributes to his disability was waived. In this regard, the Employer notes that at the initial hearing in 2004, the Claimant's counsel referred to back complaints, but that the Claimant never filed a claim for back pain at that time or at any time since then, thereby waiving any such claim. Resp. Br. at 9.¹² The Claimant does not address the issue of timeliness of the back injury claim. Rather, the Claimant argues that based upon the

¹¹ The Claimant points out that in my initial decision, I relied upon cold sensitivity as well as pain in determining that the Claimant was unable to perform his regular job. Cl. Br. at 6. The evidence of cold sensitivity in the present matter is weak. In addition, the Employer has not argued that the Claimant could return to his regular job which required some outside work and, indeed, the jobs the Employer identifies here do not appear to require outside work. Thus, any cold sensitivity would not be a determining factor in evaluating a change in the Claimant's physical condition or the Claimant's ability to work.

¹² Although the Respondent does not cite a statutory provision or legal authority in support of this argument, it appears the Employer may be relying on Section 13 of the Act.

records of Dr. Oswald and Dr. Kary he has established a prima facie case that he suffers from back pain which could have been caused by his work conditions. Cl. Br. 12. He asserts that he is therefore entitled to the 20(a) presumption which the Employer has not attempted to rebut. *Id.*

Section 13(a) of the LHWCA states that the right to compensation for disability shall be barred unless the claim is filed within one year from the time the claimant becomes aware, or in the exercise of reasonable diligence should have been aware, of the relationship between the injury and the employment. 33 U.S.C. § 913(a). *See Spear v. General Dynamics Corp.*, 25 BRBS 254 (1991). It is firmly established that the initial burden is on the claimant to show that the filing of the claim was done within Section 13's prescribed time. *Romaniuk v. Locke*, 3 F.Supp 529 (D.N.Y. 1932). The Claimant concedes that he saw Dr. Kary for back pain first on July 3, 2003. At the initial hearing in September 2003, the Claimant did not allege back complaints associated with the work-related left foot injury. The Claimant did not file a claim for compensation for back pain associated with the left- foot injury within one year of seeing Dr. Kary. Accordingly, the claim for compensation for back pain is untimely.

c.) Was the Psychological Condition Aggravated by Work Injuries?

There is no real dispute that the Claimant currently suffers from a significant psychiatric condition. *See* CX 12 and EX 3. Nor is there any dispute that the Claimant had a psychiatric condition prior to his injuries at Atkinson. Cl. Br. at 7; EX 6; CX 8 at 53-54. The key issue is whether the current psychiatric condition was aggravated by injuries sustained while he was employed by Atkinson. The Employer maintains that the Claimant's psychiatric condition was not caused or aggravated by his foot injury. Resp. Br. at 10-11. The Employer contends that the current disability is a progression of pre-existing depression and Bipolar Affective Disorder and is not the result of any of the physical injuries he sustained working at Atkinson. *Id.* at 10-11. In contrast, the Claimant contends that his pre-existing psychiatric condition was aggravated by his work-related injuries and has contributed to his current disability and his inability to work. Cl. Br. 6-11.

Under the aggravation rule "where a claimant's employment aggravates, accelerates or combines with a pre-existing condition, the entire resulting disability is compensable." *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 605 (1st Cir. 2004); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 624 (9th Cir. 1991). However, if the disability resulted from the natural progression of the pre-existing injury and would have occurred notwithstanding the subsequent work-related injury, then the Employer is not liable. *Bath Iron Works Corp. v. Director, OWCP*, 244 F.3d 222, 227 (1st Cir. 2001); *Foundation Constructors*, 950 F.2d at 624. The Employer can only rebut a Section 20(a) presumption of causation with "substantial evidence that claimant's condition was not aggravated by his working conditions." *Preston*, 380 F.3d at 605.

The Claimant has submitted the records of Dr. Singh, his treating psychiatrist, who has diagnosed the Claimant with "bipolar affective disorder, type II, currently depressed and panic disorder without agoraphobia." CX 12 at 79. Both the Claimant's and the Employer's psychiatric experts agree the Claimant has Bipolar Affective Disorder.

The Claimant alleges that the work-related injury aggravated his psychiatric condition and as evidence of the causal relationship he relies upon the opinion of his treating physician Dr. Oswald and his treating psychiatrist, Dr. Singh. Dr. Oswald first treated the Claimant for an anxiety disorder and depression in 2000. He prescribed Celexa. The Claimant saw Dr. Oswald for psychological concerns again in 2004 when he complained of increasing anxiety and depression. At that point Dr. Oswald noted the Claimant was disabled as a result of work injuries to the foot and wrist and was having some marital difficulties. The Claimant first saw Dr. Singh in August 2004. Dr. Singh diagnosed bipolar affective disorder, currently depressed panic disorder. Dr. Singh noted sources of stress contributing to the Claimant's psychological condition included his other medical conditions, his injuries, pain loss of function from injuries and periodic marital conflict. Dr. Singh opined that chronic pain contributed to the Claimant's mood disturbances and he explained that "bipolar disorder is not caused by an injury, but any mood disorder can be affected by ongoing medical or psychological stressors and chronic pain is a known stressor." EX 5 at 28-29. Dr. Singh is not optimistic that the Claimant could return to work in the near future because "he has a combination of bipolar disorder and panic disorder and this is a serious psychiatric condition, a combination of conditions that has affected his functioning for a significant period of time" and returning to work would require an "absence of psychiatric symptoms for a reasonable period of time, absence of pain symptoms for a reasonable period of time." EX 5 at 33. Dr. Singh, having been able to observe the Claimant for an extended period of time, testified that although there were periods when the Claimant was stable and his symptoms appeared to recede, the condition is chronic and he was never completely free of his symptoms for a significant period of time.

Dr. Newcomb, a psychiatrist who performed an independent medical evaluation of the Claimant at his request on November 3, 2005, also diagnosed bipolar disorder, depression, panic disorder and provided a GAF score of 40. CX 17 at 127. Dr. Newcomb concluded that the Claimant's condition was aggravated by his physical work-related injuries and explained that "injuries which involve limitation of function and chronic pain often contribute to anxiety and depression." *Id.* He opined that the Claimant's physical injuries made a "significant contribution" to the severity of his depression and panic disorder. *Id.* Dr. Newcomb specifically stated that the Claimant's symptoms of poor concentration, depressed mood, impaired sleep, and mental fatigue would preclude sustained gainful employment. *Id.* Based upon the opinions of Dr. Oswald, Dr. Singh and Dr. Newcomb, the Claimant has demonstrated working conditions which could have caused harm.

In support of its assertion that the Claimant's current psychological condition is unrelated to his employment and is simply the natural progression of his pre-existing psychological condition, the Employer notes that the Claimant was first treated for depression and anxiety by Mr. Rau in the mid 1990s and during that period he lost time from work and experienced lapses in concentration, similar to the symptoms he currently reports associated with his psychiatric condition. Resp. Br. at 10. At the hearing in the present modification proceeding, the Claimant stated that he did not miss work as a result of his psychological issues during the time he treated with Mr. Rau in the mid 1990s. The Claimant's testimony in this regard is not credible as it is not consistent with Mr. Rau's treatment records which reflect that the Claimant did miss days from work and experienced difficulties in concentration as a result of depression/relationship issues for which he was being treated. *Compare* TR 33 and EX 6. Treatment records from Mr.

Rau demonstrate that the Claimant lost occasional days from work and experienced concentration issues as a result of depression prior to his work injuries at Atkinson. Dr. Singh and Dr. Newcomb indicate that Claimant's concentration difficulties are now significant.

The Employer also points to the opinion of its psychiatric expert, Dr. Bourne, to support its assertion that the current psychiatric condition is the natural progression of his pre-existing psychiatric condition. Dr. Bourne opined the Claimant's psychiatric condition, bipolar disorder, most recent depressed, and a panic disorder with agoraphobia is not related to his work-related physical injuries. EX 3 at 26. Dr. Bourne stated that although the Claimant's panic disorder may have developed after the injuries, it is unlikely that the effects of the injuries caused the disorder. *Id.* He attributes the worsening of the psychiatric conditions, "to the progression of the illness itself." *Id.* Dr. Bourne's discussion and opinion of the Claimant's diagnosis contains very little explanation beyond a listing of the Claimant's symptoms and stressors. His brief discussion of causation states that "it is unlikely that his panic disorder was caused by the effects of his injuries" but offers no medical explanation for this conclusion. *Id.* He states that the Claimant's current condition is the natural progression of his illness but offers no information on how bipolar affective disorder with depression progresses in the average patient. Nor does he address what impact stress from constant pain may have on the Claimant's psychiatric conditions. Dr. Singh and Dr. Newcomb explained that stress contributes to mood disorders and Dr. Newcomb indicated that the Claimant's chronic pain contributed to his panic disorder. In the absence of an explanation for ignoring the effects stress resulting from limitation of motion or chronic pain has in the aggravation or exacerbation of the pre-existing bipolar disorder, Dr. Bourne's opinion is accorded less weight than the opinions of Dr. Singh and Dr. Newcomb, who both explain that mood disorders can be exacerbated by stress. In addition, Dr. Bourne acknowledges that it is possible the panic disorder developed after the work injury, but concludes it was unlikely that the panic disorder was caused by the injuries without providing a rational or explanation for his conclusion. Thus, I credit the opinions of Dr. Singh and Dr. Newcomb over that of Dr. Bourne. Accordingly, I find that although the Claimant had a psychiatric condition prior to his employment at Atkinson, his work injuries, in particular the injury to his left foot, contributed to an aggravation and a worsening of his psychiatric condition. There is no dispute that the Claimant currently suffers from a significant psychiatric condition. The foot pain in combination with the psychiatric condition, demonstrate that the Claimant's medical condition is worse that it was when the Decision and Order Awarding Benefits was issued. Thus, while the Employer has shown a change in the Claimant's physical condition as the left foot impairment is now permanent, the Employer fails to show an improvement in the Claimant's overall physical/medical condition in light of my finding that the work-related left foot injury aggravated his pre-existing psychiatric condition.

2. Change in Economic Condition

It appears the Employer may also be asserting that the Claimant's earning capacity has improved.¹³ The Employer relies upon its vocational expert, Mr. Temple, in its efforts to show

¹³ The Employer never states directly or explicitly that it is asserting an improvement in the Claimant's earning capacity as a separate basis for modification. Resp. Br. 1-12. However, the Employer does state that because the left foot impairment is now permanent, the Claimant is entitled to benefits under Section 8(c)(4) for a partial disability which suggests that the Employer is arguing that the Claimant's economic condition may have improved

suitable alternate employment.¹⁴ The Claimant argues that the Employer is precluded from offering evidence of suitable alternate employment at this point because the Employer elected not to offer such evidence at the initial hearing citing *Lombardi*, 32 BRBS at 83. Cl. Br. at 12.

In *Lombardi*, the Employer defended a claim of total disability solely on the basis that the claimant could do his pre-injury work and therefore did not present evidence regarding the existence of suitable alternate employment. *Lombardi*, 32 BRBS at 84. During a modification proceeding, the Employer attempted to submit evidence on the availability of suitable alternate employment. *Id.* The judge denied the request for modification, stating that the Employer was precluded from showing a change in condition with evidence of suitable alternate employment when the Employer had specifically declined to submit vocational evidence to support an alternate defense at the initial hearing. *Id.* The Board affirmed the ALJ's decision denying modification and held that evidence of suitable alternate employment must demonstrate that there was, in fact, a change in the Claimant's economic condition from the time of the award to the time modification was sought.¹⁵ *Id.* at 86.

In *Jensen II*, 34 BRBS at 147, the Employer introduced evidence of suitable alternate employment at the initial hearing which the judge rejected as insufficient to determine if the jobs were suitable. *Jensen II*, 34 BRBS at 148. On modification, the Employer again presented evidence of a change in economic condition and suitable alternate employment which the ALJ initially found to be untimely. *Id.* The Employer appealed to the Benefits Review Board which held that an Employer should not be precluded from attempting to improve upon evidence that was previously submitted. *Id.* On this basis, the Board distinguished and narrowed its decisions in *Lombardi* and *Feld*, holding that those decisions "stand for the proposition that when an employer presents no evidence of suitable alternate employment at the initial proceeding, and, on modification, no evidence of extenuating circumstances that prevented it from doing so, or of a change in the claimant's economic position, employer is not entitled to modification based on evidence of the current availability of jobs. Under these circumstances the new submission is merely a change in litigation strategy for which modification is not available." *Id.* at 151.

At the initial proceeding in this matter, the Employer did not offer evidence of suitable alternate employment. At the time of the initial hearing, the Claimant had recently undergone surgery on the left toe by Dr. Sacco, and the Employer requested that the record be left open for the left foot injury claim so that Dr. Sacco could be deposed and additional evidence could be developed if necessary. CX 19 at 145. Dr. Sacco's deposition was submitted and accepted. *Id.* The Employer did not present any evidence on the issue of alternate employment. CX 19 at 152.

to the point where he is able to work. Resp. Br. at 7-9. However, the Employer does not assert that the Claimant can return to his regular job.

¹⁴ Mr. Temple testified, and his report reflects, he used work restrictions assigned by Dr. Kolkin in preparing his report identifying suitable jobs. TR 77; EX 4.

¹⁵ The Board's *Lombardi* decision is a narrow one based upon the unique facts presented. *See also Feld v. Gen. Dynamics Corp.*, 34 BRBS 131, 135-136 (2000) (as employer offered no evidence of suitable alternate employment at the initial proceeding, no evidence of extenuating circumstances that prevented it from doing so, and no evidence of a change in claimant's employability, the fact that the employer now possessed evidence of the kind it chose not to develop at the initial hearing is insufficient to bring claim within scope of Section 22).

In the present matter, the Employer argues that evidence of suitable alternate employment was not submitted because “there was not much doubt that [Claimant] at the time suffered from temporary total disability.” TR 16. I would accept this explanation except for the fact that following Dr. Sacco’s deposition in the initial matter, the Employer did not concede or stipulate that the extent of the impairment was total at that point. Rather, the Employer continued to assert that any impairment was partial and that the Claimant could perform his regular job and thus, did not offer evidence of alternate work. CX 19 at 152-153. I find that the Employer had a full and fair opportunity to litigate the extent of the Claimant’s disability and made a tactical decision to pursue a defense that did not involve vocational evidence.

The Employer argues that the principles of *Lombardi* and *Feld* do not apply to this case. Resp. Br. 8. The Employer asserts that this case can be distinguished because here the Employer is seeking to modify the nature of the employee’s disability and maximum medical improvement had not been reached as of the date of the initial hearing. However, I note that in this case the parties are not disputing that the nature of the Claimant’s impairment has changed from temporary to permanent. The real dispute is whether there has been a change in the extent of the Claimant’s disability and as such the date of maximum medical improvement is not controlling. The Employer argues that the labor market evidence is “intended simply to corroborate the reality that the employee has regained a capacity to perform alternate work.” Resp. Br. 9. However, the fact remains that the issue of whether the impairment was total or partial was litigated at the first hearing and the Employer failed to submit evidence of suitable alternate employment. CX 19 at 152. As the Employer failed to submit evidence of suitable alternate employment in the initial proceeding and has not presently submitted evidence of extenuating circumstances for such failure, *Jensen II* and *Lombardi* control and the Employer is precluded from offering evidence of suitable employment to satisfy the threshold requirement of bringing the claim within the scope of Section 22.

In the interest of completeness and, assuming arguendo, that the Respondents could properly offer vocational evidence, I nevertheless find that the Respondents have failed to establish suitable alternate employment taking into account the Claimant’s education, experience and medical condition. Mr. Temple testified that in developing his Labor Market Survey and identifying specific jobs suitable for the Claimant he used the physical restrictions Dr. Kolkin and Dr. Gardner recommended. Those restrictions preclude kneeling, squatting and standing on his toes. TR 77; EX 1 at 2; EX 2 at 9; EX 4 at 3, 5. Although Mr. Temple equivocated on whether he also considered restrictions related to the Claimant’s psychological condition, stating he did take them into consideration, but then conceding his report does not reflect that he did so, I find that he failed to evaluate the impact of the Claimant’s psychiatric condition when he identified suitable jobs. TR 77, 81-82; EX 4 at 5.¹⁶ The Claimant’s treating psychiatrist, as well as both the Claimant’s and the Employer’s psychiatric experts, have concluded that the Claimant’s psychological condition precludes gainful employment. The Employer’s vocational evidence of suitable jobs is entitled to little weight, as Mr. Temple ignored limitations to employment resulting from the Claimant’s psychiatric condition. I find that the Employer failed

¹⁶ Indeed, Mr. Temple stated that he tried to find low stress jobs for the Claimant based upon Dr. Newcomb’s medical report but, when pressed, he admitted that he did not see a reference to low stress jobs in Dr. Newcomb’s report. TR 81. He also acknowledged that he had not seen Dr. Bourne’s report when he prepared his Labor Market Survey. TR 78.

to show suitable alternate work for the Claimant. Therefore, the extent of the Claimant's disability remains total. Accordingly, the Employer failed to show an improvement in the Claimant's economic condition. Therefore, to the extent that the Employer's request for modification is based on an alleged improvement in the Claimant's wage earning or economic condition, the modification is denied.

E. Medical Care

Under Section 7 of the Act, a claimant who suffers a work-related injury is entitled to reasonable and necessary medical treatment. 33 U.S.C. § 907(a); *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989); *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). I have determined that the Claimant's current permanent total disability is related to his employment with Atkinson Construction Company. The Claimant is, therefore, entitled to medical care for his work-related left foot and psychological condition. As the responsible party, the Employer in the instant matter thus remains liable for this Claimant's medical benefits. Accordingly, I conclude that the Employer shall pay the Claimant for medical expenses reasonably and necessarily incurred as a result of the Claimant's work-related injuries. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988).

F. Attorney's Fees

Having successfully established his right to compensation and medical care, the Claimant is entitled to an award of attorney fees under section 28 of the Act. *American Stevedores v. Salzano* 538 F. 2d 933, 937 (2nd Cir. 1976). The Claimant's attorney, James W. Case, submitted a fee petition on August 30, 2006. My Order will grant the Employer fifteen days from the entry of this Decision and Order to file any objection.

IV. ORDER

Based upon the Findings of Fact and Conclusions of Law and upon the entire record, I issue the following compensation order:

1. The Employer shall pay to the Claimant permanent total disability payments pursuant to 33 U.S.C. § 908(a) for his work-related left foot injury and associated psychological condition beginning March 29, 2005, the date of maximum medical improvement, to the present and continuing, at a rate of 66 2/3% of the Claimant's average weekly wage, of \$943.19;
2. The Employer is entitled to a credit for temporary total disability benefits paid to the Claimant since March 29, 2005, pursuant to 33 U.S.C. § 908(b), for the Claimant's work-related injury;
3. The Employer shall continue to provide the Claimant with reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related left foot injury and psychological condition may require pursuant to 33 U.S.C. § 907;

4. The Employer shall have 15 days from the entry of this decision to file any response to the Claimant's attorney fee petition;
5. All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

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COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts